

United Parcel Service, Inc. and Andre Kazanjian.

Cases 27–CA–16064, 27–CA–16140, and 27–CA–1654–1

April 30, 2001

DECISION AND ORDER**BY MEMBERS LIEBMAN, HURTGEN, AND WALSH**

On August 11, 2000, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Parcel Service, Inc., Commerce City, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

William J. Daly, Esq., for the General Counsel.

John M. Husband, Esq. and Erika A. Fedge, Esq., for the Respondent.

James Fattor, Esq., for the Charging Party.

DECISION¹

ALBERT A. METZ, Administrative Law Judge. The issues presented are whether certain of Respondent's actions involving its employee, Andre Kazanjian, violate Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).² On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings, Member Hurtgen finds it unnecessary to pass on the 8(a)(4) allegation, inasmuch as the discharge is effectively cured by the 8(a)(3) remedy.

² This case was heard at Denver, Colorado, on February 9–11 and 14, 2000.

³ 29 U.S.C. § 158(a)(1), (3), and (4).

FINDINGS OF FACT**I. JURISDICTION AND LABOR ORGANIZATION**

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Teamsters Local Union 435 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent is in the business of the interstate transportation and delivery of parcels. The Respondent operates a terminal at Commerce City, Colorado, which is the location involved in this case. The Union represents some of the Commerce City employees. Their collective-bargaining agreement contains a grievance procedure for resolving disputes.

Andre Kazanjian started working at the Commerce City facility on February 8, 1995. Kazanjian has performed union steward functions since 1997. Kazanjian was zealous in the pursuit of his steward duties, including the filing of approximately 200–250 grievances against Respondent as well as numerous unfair labor practice charges.

The Respondent terminated Kazanjian on two occasions. His discharges and the surrounding events are the issues in dispute in this case. The Government alleges that Kazanjian was coerced and terminated because of his protected activities including his filing of unfair labor practice charges against the Respondent. The Respondent denies that any actions it took against Kazanjian were unlawful, but rather were the result of his own misconduct.

III. SUPERVISOR COOPER'S CONFRONTATION WITH KAZANJIAN

The Government alleges that in early September 1998 Respondent's division manager, John Cooper, harassed and coerced Kazanjian because he had filed a grievance under the collective-bargaining contract.

On September 14, 1998, Kazanjian filed a grievance relating to the suspension and discharge of employee Fred Hall. The grievance named Division Manager John Cooper because his name appeared on disciplinary letters that were issued to Hall. Cooper's signature appeared on Hall's termination letter, but it was customary that a secretary would actually sign his name. The grievance implied that Cooper had targeted Hall for termination as a means of reducing the Twilight Sort shift's OSHA reportable injury rate. Cooper was irritated at having his integrity questioned by such an assertion. Cooper had been on special assignment during the period of time relevant to the grievance and did not personally participate in the decisions regarding the grievant.

A short time after the Hall grievance was filed, Cooper approached Kazanjian and questioned why he had been named in the grievance. Kazanjian noted that Cooper was agitated about being named. Kazanjian told Cooper that he would not talk about the grievance because the matter was scheduled for a local hearing. According to Kazanjian, Cooper insisted that they discuss the grievance. Kazanjian testified that because of Cooper's angry demeanor he stated that he wanted another union steward present. Cooper repeated his displeasure about

being named in the grievance and insisted the matter be discussed at that time. Kazanjian reiterated that he could not discuss the grievance without a steward because he now considered Cooper's confrontation with him to be an investigatory interview. Cooper consented that Kazanjian could have a steward present.

There is some dispute about what happened next. According to Kazanjian, he and Cooper started to get a steward when Cooper suddenly ordered him to return to where Cooper was standing. Kazanjian said that he was going to get a steward. Cooper then said Kazanjian was refusing to work as directed. Kazanjian returned to Cooper. Cooper then again said that they would get a steward and both men went to another location in the facility and contacted steward, Byron Moore.

According to Cooper, Kazanjian said that he was going to get a steward and that he was going to file charges against Cooper. Kazanjian then walked away from Cooper. Cooper then directed Kazanjian to stop three separate times. The final time he told Kazanjian he was giving him a direct order to stop. Kazanjian finally responded by returning to where Cooper stood. Cooper then said that he would get a steward for Kazanjian and they both went and got Moore. Based on the demeanor of the witnesses, I find that Cooper's portrayal of events is the more accurate recitation of what was said and done relative to Kazanjian walking away from Cooper.³

Cooper, Kazanjian, and Moore went to an office where Cooper stated that Kazanjian had failed to work as directed. Kazanjian denied that he had failed to work as directed. Moore told Kazanjian that he should work as directed and Kazanjian reiterated that he had worked as directed. Cooper stated that he thought that his name appeared on the grievance was unfair and that the allegation of the grievance was a lie. Kazanjian said that he had evidence to support the allegation. Kazanjian explained that Cooper's name appeared in the grievance because his name had appeared on the disciplinary letters issued to Fred Hall. Cooper asked what evidence Kazanjian had to support the allegation. Kazanjian said that the evidence would be presented at the local hearing. Kazanjian invited Cooper to attend that hearing. The meeting then ended. Kazanjian was not disciplined for any alleged failure to work as directed. On September 23, 1998, Kazanjian filed an unfair labor practice charge regarding his encounter with Cooper. Kazanjian and Cooper both testified that it was not uncommon for stewards and management to informally discuss grievances.

The test of whether an employer's remarks or actions violated Section 8(a)(1)'s prohibition against interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *Field-*

crest Cannon, Inc., 318 NLRB 470, 490 (1995). The filing of a grievance is protected activity within the meaning of Section 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984).

I find that Cooper's insistence upon discussing the grievance was not unlawful. Cooper wanted an explanation of why he was named in the grievance. Cooper admitted that he was "irritated" and "a little upset" because he had been named in the grievance. I find that Kazanjian precipitously walked away from Cooper when he went to get a steward and Cooper had to three times order Kazanjian to return to him. The two men then got a steward, discussed the matter, including Cooper's assertion that Kazanjian had not worked as directed when he had walked away from Cooper and initially failed to respond to his direction to return. Kazanjian was not disciplined for anything he did on this occasion and the matter ended there. I find that on balance Cooper's actions in wanting to discuss the grievance and his insistence that Kazanjian not walk away from him during their discussion was not of such a character as to have a reasonable tendency to interfere with the free exercise of employee rights under the Act. I find that the Respondent did not violate Section 8(a)(1) of the Act by Cooper's actions on this occasion.

IV. EVENTS OF NOVEMBER 16, 1998

A. Kazanjian's Confrontation with Rooney

On November 16, 1998, Kazanjian and Supervisor Rich Rooney had a confrontation that led to Kazanjian's first discharge. The Government alleges that in this encounter Rooney struck Kazanjian because he had threatened to file an unfair labor practice charge against Rooney. The Respondent denies any such motivation existed and contends that Rooney merely shoved Kazanjian away from him when Kazanjian spit on him.

Kazanjian, in addition to his normal duties, frequently performed Saturday air delivery work for the Respondent. He had a practice of checking his recorded hours for such work. On November 16, 1998, as Kazanjian was leaving work for the day he went to the Commerce City Center office to check his hours. Kazanjian asked Lee Johnston, a part-time supervisor, to see his driving records for the previous Saturday. Johnston said there would be a short delay because he was printing some documents from the computer at that time. As Kazanjian waited for his records he was looking down the hallway. Supervisors Keri Alderman and Steve Sparks walked by and Sparks asked Kazanjian what he was doing. Kazanjian said that he had made a phone call and was getting some information. Alderman asked Kazanjian if he was still on the clock. Kazanjian was upset by this question and asked Alderman why she was harassing him. He told her that he was going to file a NLRB charge against her. He then returned to the interior of the office and sat down to wait for his driving records.

Kazanjian's failure to answer Alderman's question was shortly related to Supervisor Rich Rooney, who was in an office next door. Rooney then went to the City Center office, opened the door, and asked Kazanjian if he was on the clock. Kazanjian testified that he said he was not on the clock and that he thought that Rooney was harassing him. He told Rooney that he was going to file a NLRB charge against him. Kazanjian testified that Rooney then came at him where he was seated and

³ As set forth below, Kazanjian is credited in other regards. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) ("Nothing is more common in all kinds of judicial decisions than to believe some and not all [of what a witness says]."); *Champion Papers, Inc. v. NLRB*, 393 F.2d 388, 394 (6th Cir. 1968) ("A fact finder—jury, judge or administrative agency—is not barred from finding elements both of truth and untruth in a witness' testimony."); *NLRB v. Pat Izzi Trucking Co.*, 395 F.2d 241, 244 (1st Cir. 1968) ("That part of a witness' testimony is not believable does not of itself destroy the rest.").

angrily shouted, "You're going to file a charge against me in my own building?" Kazanjian stated he felt threatened by Rooney's actions and stood up. Rooney then moved closer and placed his chest against Kazanjian's chest. As they stood facing each other, Rooney and Kazanjian continued to exchange words. Kazanjian recalled Rooney repeated the question about Kazanjian filing charges against him in his own building. Kazanjian states he then attempted to move past Rooney in an effort to leave the office. Kazanjian testified that at this point Rooney placed both hands on Kazanjian's chest and pushed him into the opened door. Rooney then stated that Kazanjian had spit in his face. Kazanjian denied he spit in Rooney's face and said that he was going to file an assault charge with the police. Kazanjian then exited the office. Kazanjian testified that he never spit at Rooney at any time during the incident. Kazanjian testified that when he exited the office he observed Supervisor Chris Swanson, standing in the hallway near the Commerce City Center office next to a solid wall that permitted no view into that office.

Rooney testified that he asked Kazanjian if he was on or off the clock. At this point, Kazanjian said he was going to file a NLRB charge. Rooney testified that he said he did not care. Kazanjian then started "screaming and hollering" at him and jumped out of his chair. Kazanjian spit in his face as he came at Rooney. Rooney said he pushed Kazanjian away from him, out the door. Rooney recalled that as Kazanjian left the office he said again that he was going to file charges and get the police. Rooney denied that he made any move towards Kazanjian and testified that he remained in the doorway to the office. Rooney testified that he had contact with Kazanjian before November 16 and that Kazanjian had always been friendly toward him.

Employee Michael Johansson observed the encounter between Rooney and Kazanjian through a sliding glass window in an adjacent office. Johansson testified that he saw Rooney and Kazanjian exchanging words and he saw Rooney push Kazanjian into the door. After observing the confrontation, Johansson hurriedly came out of his office and went to the door of the Commerce City Center office. Johansson testified that as he left his office he noticed Supervisor Chris Swanson standing in the hallway by a solid wall that did not have a clear view into the Commerce City Center office. Johansson testified that he did not see Kazanjian spit on Rooney.

After Kazanjian and Rooney exited the office, Rooney walked past Johansson in the hallway. Johansson did not observe any spit on Rooney's face nor was Rooney wiping his face. A few seconds later, Rooney approached Johansson and told him that Kazanjian had spit on him and that was why he had pushed Kazanjian. Rooney asked Johansson if he would not shove someone if they had spit in his face. Johansson saw no spit on Rooney's face but Rooney was wiping his face with his hand.

Chris Swanson testified that he was in the window of the Commerce City Center office and observed Kazanjian stand up aggressively, slam his chair, and charge at Rooney. Swanson testified that as Kazanjian charged at Rooney, he spit in his face, and then barged by Rooney, who was holding the door open.

Supervisor Lee Johnston was in the City Center office during the encounter between Rooney and Kazanjian. He recalled that Rooney asked Kazanjian if he was on the clock. Kazanjian then said that he was going to file harassment charges against Rooney. Rooney said that he was only asking if Kazanjian was on the clock. Kazanjian then jumped out of his chair and got chest to chest with Rooney and they briefly argued. Rooney then pushed Kazanjian away from him toward the door and said something like, "[D]on't ever spit in my face again." Johnston testified that he could only see Rooney from the side and did not see Kazanjian spit in his face. Johnston also did not observe any spit on Rooney's face and he did not see Rooney wipe his face.

I found the witnesses to the sudden confrontation between Kazanjian and Rooney all testified to the best of their recollections as to what they observed. None of them testified that they heard Rooney say words to the effect he was angry with Kazanjian about his going to file charges against him. I found Johnston, the only other person in the room, to be particularly credible and forthright about what he observed. As he related, Rooney reacted calmly to Kazanjian's threat to file charges and again stated that he was only inquiring if Kazanjian was on the clock. I also find that, as Johnston related, it was Kazanjian that jumped out of his chair and approached Rooney in a distraught manner. I find that Kazanjian did not deliberately spit in Rooney's face. Based, however, on Rooney's instantaneous reaction at the time, and his demeanor while testifying, I find that Kazanjian did inadvertently spray Rooney's face with spit as the two engaged in a chest-to-chest heated argument. In a natural reaction to such an incident, I find that Rooney shoved Kazanjian away from him.

In sum, I find that Kazanjian, offended by what he thought was an unreasonable question from a supervisor, charged at Rooney and engaged him in an excited argument. I do not find that Rooney's conduct was a result of Kazanjian's threat to file a charge against him. I do not find that Rooney's actions reasonably had a tendency to threaten, coerce, or restrain employees for engaging in protected activity. I conclude that the Respondent did not violate the Act by anything that happened between Rooney and Kazanjian on November 16, 1998.

B. Kazanjian's First Termination

Twilight Sort Manager Kelly Schmaltz testified that she learned of the encounter between Rooney and Kazanjian immediately after the incident. Schmaltz credibly testified that she at once went and talked to some of the witnesses. She then telephoned Cooper and reported what she had learned. Cooper then spoke to Rooney and Swanson and got their versions of what had occurred. Finally, Schmaltz got back on the phone and Cooper told her to gather all the facts from both sides and that she needed to make a decision based on what she heard. She told the witnesses she had spoken to at that point to write down what they observed while the incident was still fresh in their minds. Kazanjian returned to the Commerce City Center office about this time with Steward Jim Osborne. They met with Schmaltz, Safety Supervisor Larry Wells, and Supervisors James Gilchrest and Chris Swanson. Kazanjian at first refused to tell Schmaltz what had happened between he and Rooney.

Finally, after urging from Osborne, Kazanjian related to Schmaltz that he had been waiting for his driving records and that Rooney had assaulted him. He denied that he had spit on Rooney's face. After hearing from Kazanjian, Schmaltz made the decision to terminate him and informed him of her decision. Kazanjian then left the Respondent's facility and went to a police station where he filed a report that Rooney had assaulted him. I credit Schmaltz' testimony that it was her independent decision to terminate Kazanjian based on her investigation.

On November 24, 1998, Twilight Hub Division Manager John Cooper issued a letter to Kazanjian confirming that he was terminated effective November 16 because he had spit on a management official. Kazanjian filed a grievance concerning his termination. The central region committee (a joint management-labor committee) ultimately heard the grievance. The committee issued a two-sentence decision that ordered Kazanjian's termination reduced to a suspension and that he be reinstated without backpay. Kazanjian was reinstated on February 1, 1999. A Commerce City, Colorado jury heard Kazanjian's criminal assault charge against Rooney. Rooney was acquitted of the charge.

C. Analysis of the November 16 Discharge

The Respondent initially argues that this unfair labor practice proceeding rehashes Kazanjian's two terminations and, to that extent, should be dismissed because the contractual dispute proceedings have already made determinations regarding his similar grievances. I reject the Respondent's argument that I should defer to the panels' decisions regarding Kazanjian's two discharges. Kazanjian's discharges are alleged in the complaint to have been, in part, motivated by his filing of unfair labor practice charges under the Act. The Board does not defer alleged violations of Section 8(a)(4) to private dispute resolution. *Equitable Gas Co.*, 303 NLRB 925, 927 (1991); *International Harvester Co.*, 271 NLRB 647 (1984); and *Filmation Associates*, 227 NLRB 1721 (1977). I find that Kazanjian's unfair labor practice charges relating to his two discharges are not deferrable under the Act.

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Electromedics, Inc.*, 299 NLRB 928, 937 (1990), *enfd.* 947 F.2d 953 (10th Cir. 1991); *and Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1478-1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 *fn.* 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either

did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* sub nom. 705 F.2d 799 (6th Cir. 1982). The *Wright Line* standard is also used in assessing alleged violations of Section 8(a)(4) of the Act. *Gary Enterprises*, 300 NLRB 1111 (1990).

The General Counsel has shown by its case that the Respondent had admitted knowledge of Kazanjian's union and protected activities. Kazanjian's first discharge followed shortly after his statement that he was going to file charges against Rooney with the Board. The credited evidence also shows that Rooney did not take umbrage at Kazanjian's statement and that it was Kazanjian who jumped out of his chair, confronted Rooney and accidentally spit on him. Based on her understanding that Kazanjian had spit on Rooney, Schmaltz made her decision to terminate Kazanjian's employment. I find that the Government has not shown by a preponderance of the evidence that Kazanjian's November 16 discharge was based on his activities protected under the Act. I find that the Respondent did not violate the Act when it discharged Kazanjian on November 16. *Wright Line*, *supra*.

V. KAZANJIAN'S SECOND DISCHARGE—MARCH 22, 1999

Kazanjian was reinstated to work on February 1, 1999, at which time he resumed his duties as steward. Kazanjian worked for the Respondent until March 22, 1998, when he was again terminated. The Government alleges the second termination was the result of his protected concerted activities, including the filing of unfair labor practice charges. The Respondent denies these allegations and asserts that Kazanjian was fired because he refused to follow repeated orders to leave the Respondent's premises after he was off work.

On February 10 Kazanjian attended a grievance meeting with new division managers, Al Falco and Ben Stewart, and Supervisor Schmaltz. During this meeting Kazanjian brought to Falco's attention problems regarding supervisors wearing nametags and the posting of seniority lists.

On February 11 Falco and Stewart were at Kazanjian's time-clock when he reported for work. Falco asked Kazanjian what time he started work. Kazanjian said that he did not know his start time because his name was not listed on the start time list. The start time list shows the employee's name, start time and work area. Kazanjian's name had not been on the start time list since he returned to work on February 1, 1999.

Falco asked Kazanjian what work area he was assigned. Kazanjian replied that he wanted a union steward. Kazanjian then took out a card that listed employees' *Weingarten* rights to representation by a union representative during an investigatory interview.

Steward Byron Moore was nearby and came over to where the men were standing. Kazanjian then filled out a grievance form alleging that he was being harassed. Kazanjian offered the grievance to Falco and Stewart, but neither would accept the form.

Kazanjian and Moore then walked to Kazanjian's work area followed by Falco and Stewart. Falco asked Kazanjian how he

knew where his work area was. Kazanjian said that this was where he had been recently working. Falco then spoke to Supervisor Ron Yeager and told him to get Labor Relations Manager Dan Flores. Flores came to the work area and Falco told him that Kazanjian did not know what his start time was so he was probably late. Flores responded that he guessed that they would have to write Kazanjian up for being late.

Falco then questioned Kazanjian about a bag he was carrying. The bag contained copies of the collective-bargaining agreement, grievance forms, a pad of paper, and some information sheets. Kazanjian had routinely carried the bag at work since first becoming a steward. Kazanjian told Falco the bag belonged to him. Falco told Kazanjian that employees could not bring bags into the building. Kazanjian replied that stewards were allowed to bring bags into the building. Kazanjian told Flores that he would have to file a grievance over the matter.

After the bag was discussed, Kazanjian started work unloading "irreg" packages from the conveyor belt. (Irregs are packages that are oversized, weigh in excess of 70 pounds, or have sharp edges that could damage the belt.) Falco observed Kazanjian at work and then told him he had lowered a package incorrectly. Kazanjian asked what he had done that was in error. Falco said he could not say, as he was not an expert. Kazanjian then took off his gloves and offered them to Falco. He asked Falco to show him what he had done wrong if he was not able to tell him. Again, Falco said that he was not an expert. Falco then directed Yeager to get Safety Supervisor Larry Wells. Wells came to the work area and demonstrated safe lifting and lowering techniques. Kazanjian testified that Wells did not demonstrate any techniques that Kazanjian did not already know and utilize. Wells had Kazanjian's employee record and entered a notation that Kazanjian had requested retraining in safety. Kazanjian protested that he had not requested retraining and he stated that he knew how to lift and lower properly.

Gary Watson, a union steward and part-time employee, testified that he regularly carried a tote bag with steward materials. He recalled that a couple of years ago his supervisor advised him that he could not bring tote bags into the facility. He complained to the Labor Manager Danny Flores about the situation. Flores told him that it was okay as a steward to have such a bag in light of the necessity of stewards having union paperwork they need available. No one has prohibited him from bringing in his tote bag since that time. Flores testified that at one time a grievance panel decision sustained a company rule prohibiting part-time employees, including union stewards, from bringing bags into the facility. Neither the rule nor the panel decision was introduced into evidence. Flores did not deny that Kazanjian and Watson had been permitted to carry bags into their work areas before February 11, and, with regard to Watson, after February 11. Based on demeanor, and the record as a whole, I credit Kazanjian and Watson that they routinely carried bags without a problem prior to Kazanjian being reproached on February 11.

On February 24, Kazanjian asked his supervisor, Rachel Groppe, if he could write grievances on the clock after his shift. Groppe told Kazanjian to clock out and to report his time the next day. Kazanjian stated her instructions were contrary to past practice and that he should be permitted to remain

on the clock. Groppe continued to deny his request to stay on the clock to write grievances. Schmaltz came up to Kazanjian later and asked him who had given him permission to write grievances. Kazanjian explained that Groppe had given him permission to write grievances. Schmaltz asked Kazanjian if he was on the clock and he explained that Groppe had refused to permit him to remain on the clock. Schmaltz then told Kazanjian to leave the building. Kazanjian suggested that he could clock in again, but Schmaltz rejected his suggestion. Kazanjian requested that Steward Gary Watson be called to discuss the matter. Watson arrived shortly thereafter and Schmaltz stated that Kazanjian could not write grievances because he was not on the clock and that he had to leave the building. Kazanjian again offered to clock in, but Schmaltz again refused. Watson told Kazanjian not to argue about the matter and to leave. Kazanjian acquiesced and left the facility.

Kazanjian testified that on March 4 he and Byron Moore had clocked out and were leaving work for the day. Falco followed them as they exited the building. Kazanjian and Moore encountered Jose Sanchez, a union steward, who was reporting for the next shift. Sanchez had not yet punched in for his shift. As the employees stopped to talk, Falco told them they could not talk to each other. Kazanjian and Moore then left the building. Falco testified that he did leave work that evening behind Kazanjian but said nothing to him. Based on demeanor and Kazanjian's detailed testimony of what occurred on this occasion, I credit Kazanjian as to what occurred on this occasion.

On March 15, an employee asked Kazanjian to represent him in a matter. Kazanjian asked Groppe for permission to represent the employee. Groppe refused to give him permission. Shortly thereafter, Groppe and Falco came up to Kazanjian. Falco said that he had gotten complaints that Kazanjian had been soliciting grievances. Kazanjian asked from whom he had received these complaints, but Falco refused to say. Falco said that Kazanjian could not solicit grievances and that if he did not have irregs to pull off the belt he had to go into the trucks and start unloading. Falco said that if Kazanjian did not work as directed he would be terminated. Kazanjian then commenced unloading trucks although this was not part of his regular work assignments. None of the other six to eight employees assigned to irregs on that night were ordered to unload trucks.

On approximately March 16, Kazanjian and employee Ron Kalkhorst were in the facility waiting outside of an office in order to talk to Stewards Byron Moore and Sam Herrera, and Union Business Agent Alan Frisbee. Moore, Herrera, and Frisbee were in a meeting with management. The meeting concluded and Falco approached Kazanjian and asked if he was on the clock. Kazanjian said that he was not and that he was there to see his business agent and a steward. Falco told Kazanjian to leave the building. Kazanjian did not challenge Falco's order and began to leave. Kalkhorst started to argue with Falco about the matter, but Kazanjian told him not to press the point and Kazanjian left the building.

On approximately March 17, Kazanjian attended a safety committee meeting. During the meeting, he exchanged phone numbers with Christine Epperson, a fellow employee who was also a member of the committee. At the conclusion of the meeting, Schmaltz told Kazanjian to remain in the room while the

other employees left. Schmaltz, Falco, Larry Wells, and Bob Stanley, safety supervisor, remained in the room with Kazanjian. Schmaltz asked Kazanjian if he had distributed union literature during the meeting. Kazanjian said he had not. Schmaltz asked him what he had given Epperson. Kazanjian said that he had exchanged telephone numbers with her. Kazanjian then returned to work.

On March 22, employee Angie Caputo came to Kazanjian in his work area and said she was looking for Byron Moore so he could represent her in a dispute with her supervisor. Kazanjian and Caputo asked Groppe and Yeager about Moore's whereabouts. They did know Moore's location. Kazanjian then asked Caputo if she wanted him to represent her and she said she did. Kazanjian asked Groppe and Yeager if he could have permission to leave his work area to represent Caputo. They refused his request. Kazanjian asked if Caputo could stay in his work area until the sort was done. Groppe and Yeager agreed that she could stay.

After Kazanjian finished his shift, he and Caputo met with Supervisors Greg Lopez and Chris Gallegos to discuss her complaints. When they finished discussing Caputo's situation, Kazanjian returned to his work area to punch out. He noticed that someone had already punched him out. Caputo then approached Kazanjian and asked him to write grievances for her regarding the matters that they had discussed earlier with management. Kazanjian said he would write the grievances for her the next day.

Kazanjian then got some food and went to the breakroom. Kazanjian testified that one reason he went to the breakroom was to write some grievances that had to be submitted that night in order to be timely. It was also his intention to double shift. (The Respondent has a policy of open double shifting on the midnight shift. This policy permitted any employee, who desired, to voluntarily work on the midnight shift. An employee who was double shifting could begin his double shift at any time during the midnight shift.)

When he arrived at the breakroom, Kazanjian spoke briefly with another employee, Steve Buckles. He told Buckles that he had to write some grievances and was then going to double shift. Kazanjian then began writing grievances. Supervisor Jason Adams observed Kazanjian in the breakroom and reported his presence there to Schmaltz. Schmaltz then reported this information to Falco.

Falco asked Manager Rick Suder to accompany him to the breakroom where they found Kazanjian. Falco asked Kazanjian what he was doing. Kazanjian said that he was writing grievances. Kazanjian testified that Falco then said he was fired for failing to follow instructions to leave the building when he had completed his work. Falco then asked Kazanjian if he was on the clock and Kazanjian said that he was not. Falco asked if anyone knew that he was in the breakroom. Kazanjian said no, but he told Falco that employees were permitted to be in the breakroom. Falco asked how Kazanjian knew that and Kazanjian said that he had heard about a PCM to that effect. (A PCM—precommencement of work message—is a directive given to employees by their supervisor.) Falco asked who had given the PCM and Kazanjian responded that he did not know. (Kazanjian testified that a few days earlier another employee,

Jonathan Lindenberg, had told him about a PCM that said employees could not remain in the building after their shift unless they were double shifting or in a breakroom. Lindenberg had complained about the restriction and his supervisor had told him it was because of Kazanjian.) Kazanjian admitted that he never told Falco or Suder that the reason he was still on the premises was to double shift.

Kazanjian testified he then requested a union steward and Falco instructed Suder to get a steward. Kazanjian specifically asked for Steward Gary Watson. Suder left to find a steward and Kazanjian attempted to give Falco a *Weingarten* card. Falco did not accept the card. Kazanjian then requested that Falco sign the grievances that he had been preparing. Falco said that he would not accept the grievances because Kazanjian no longer worked there.

Suder returned to the breakroom with Steward Christy Anderson. Kazanjian said that he had requested Gary Watson. Falco then instructed Suder to get Watson. After Suder left the room, Falco told Anderson that Kazanjian had been terminated for failing to follow an instruction and he had been told that when he finished his work he had to leave the building. Kazanjian told Anderson that he had been writing grievances and that Falco was harassing him because he had been writing grievances. He showed Anderson the grievances and told her that they had to be filed before midnight or they would be untimely. Kazanjian again attempted to present the grievances to Falco and again Falco refused to accept them. Anderson did not testify at the hearing.

Watson soon arrived and Anderson left to return to work. Falco told Watson that Kazanjian had been terminated. Watson and Kazanjian left the room to discuss the situation. Kazanjian explained to Watson his version of what had occurred. As they were talking a security guard came to escort Kazanjian out of the facility. As they were leaving, Falco stated that Kazanjian was not to be in the building.

Falco testified that he and Suder went to the cafeteria and found Kazanjian. He asked Kazanjian what he was doing. Kazanjian was writing on some grievances and offered them to Falco and said, "[H]ere, sign these." Falco asked if anyone knew he was in the cafeteria and Kazanjian replied, "[N]o, sign these." Falco then asked Kazanjian if he was on the clock and Kazanjian said he was not. Falco told him he needed to leave the building if he was off the clock. Falco testified that Kazanjian replied that it was his right to be there. Falco testified that he then repeated that Kazanjian needed to leave the building. Kazanjian said, "[N]o, I was told in a PCM that I could be here." Falco inquired who gave the PCM and Kazanjian said he did not remember. Again, Falco told Kazanjian he needed to leave the building, but he continued to write without response. Falco then told Suder to get a shop steward.

Suder shortly returned and said that Steward Christie Anderson was on her way to the breakroom. Kazanjian spoke up and said he did not want Anderson, but wanted Steward Gary Watson. Suder was then instructed to attempt to find Watson. Anderson then arrived and Suder introduced her to Falco. They went to the table where Kazanjian was sitting and Falco said in front of everyone there that he was terminating Kazanjian for failing to follow instructions, "he's been told numerous times

that he must leave the building and he's refusing to leave the building." Watson appeared about this time and Falco told him, "I've asked Andre to leave the building numerous times, he's refusing to follow instructions, I'm terminating Andre for failing to follow instructions." Falco testified that during his tenure at this facility the policy was that anyone who was done with work needed to leave the facility.

Watson testified that Falco stated he had terminated Kazanjian but did not say anything about having ordered Kazanjian to leave the building or that Kazanjian had refused to leave the building. Watson also testified that he was unaware of any policy that required employees to leave the facility after punching out from their shift. Watson testified that he had never been made aware of any company policy requiring stewards to notify management before they perform grievance work off the clock. He also testified that he had performed steward investigations and the processing of grievances while off the clock, that he had not informed management of those activities, and that he had never been disciplined for such activity.

Suder testified at the hearing and corroborated Falco's testimony concerning the events that occurred in the breakroom on the night of March 22. Suder was not present in the room when Anderson, Falco, and Kazanjian were there as he left momentarily to attempt to locate Watson.

On March 26, Falco prepared a termination concerning Kazanjian. The letter stated that Kazanjian was discharged for blatantly failing to follow instructions given him by management. Kazanjian filed a grievance regarding his second discharge. On April 14, 1999, the joint panel heard the grievance. The panel, after meeting in executive session, denied the grievance.

VI. ANALYSIS OF KAZANJIAN'S MARCH 22, 1999 DISCHARGE

The Government has highlighted Kazanjian's post-February encounters with management as indicative that his March termination was motivated by his protected activities. The Respondent asserts that Kazanjian's discharge was solely the result of his repeated refusal to leave the facility as directed by Falco.

The record shows that Kazanjian remained an active steward upon his February return to work. It also establishes that he was subjected to concentrated attention by management starting with the February 11 incident where he was questioned about his start time and work area, threatened with being charged for being late, questioned about his possession of a bag, and trained for proper lifting. With regard to his bag, Kazanjian had routinely carried it with his steward supplies since the time he had first become a steward. Other stewards likewise carried such bags. Kazanjian was singled out for carrying his bag. Watson continued to carry his bag without retribution. The matter of Kazanjian having to be trained on February 11 in proper lifting and lowering is questionable. Falco was unable to tell Kazanjian what he was doing wrong and called on help from a safety advisor to provide the training. Kazanjian credibly testified that he was following proper procedures and did not require such training. In sum, I find that on February 11 Falco singled out Kazanjian for attention.

On March 4, Kazanjian and Moore were leaving the facility when they stopped to speak with Steward Jose Sanchez. All the men were off the clock and in a nonwork area, yet Falco told them that they could not talk to each other.

On March 15, Kazanjian was again scrutinized by Falco. Kazanjian testified that he requested permission from Groppe to represent an employee. Shortly thereafter, Falco and Groppe accused him of soliciting grievances. Falco told Kazanjian that he could not solicit grievances and that if he had no irregs to pull he had to unload trucks. Falco also threatened Kazanjian that if he did not work as directed he would be terminated. Kazanjian was required to unload trucks although this was not part of his regular work duties. Falco did not deny Kazanjian's testimony and Groppe did not testify. I credit Kazanjian as to what occurred on March 15. I further find that Falco was harassing Kazanjian because of his protected activities.

On March 17, Kazanjian exchanged phone numbers with another employee during a safety committee meeting so they could later discuss an impending safety committee election. Schmaltz, in the presence of Falco, interrogated Kazanjian after the meeting as to whether he had passed out union literature during the meeting. Neither Schmaltz nor Falco denied that this encounter happened. I credit Kazanjian as to what happened on this occasion. I find that the Respondent considered Kazanjian to be a major source of concern because of his enthusiastic pursuit of his union duties. I further find that this concern led to Kazanjian being the target of particular scrutiny by Falco.

Falco and Suder state that on March 22 Kazanjian was ordered three times to leave the building and he refused. Kazanjian denies he was ever ordered to leave on this occasion or that he refused to leave the building after being ordered to do so. Kazanjian had been ordered to leave the facility on other occasions. In each instance he complied. Falco admitted that he never ordered Kazanjian to leave the building while either Christie Anderson or Watson was present in the breakroom. Watson testified that Falco merely said that Kazanjian was being terminated and nothing was mentioned about his refusing to leave the building. Based on the demeanor of Kazanjian, Falco, and Suder and the record as a whole, I credit Kazanjian's version of what was said when he was discharged on March 22.

The Respondent argues that it was justified in ordering Kazanjian to leave the facility based on various rules and policies. The collective-bargaining agreement requires that a steward obtain permission before doing steward duties.

Article 4 of the collective-bargaining agreement provides, in relevant part:

Upon notification to his or her supervisor, a steward shall be afforded the right to leave his/her work area for a reasonable period of time to investigate, present and process grievances and to represent a fellow employee concerning grievances or discipline so long as such activity does not interrupt the Employer's operation.

....

Where mutually agreed to by the Local Union and Employer, stewards may investigate off the property or other than during their regular schedule [Jt. Exh. 1, pp.10—11.]

The record and a reasonable interpretation of this article lead to the conclusion that its scope is limited. The record shows that stewards needed to obtain permission from a supervisor to do union business when the steward was working or to receive pay for off the clock union activity. Such was not the case with Kazanjian on the night of March 22 as he was off the clock, in a nonwork area, and not seeking to be paid for the activity. I find that article 4 of the collective-bargaining agreement is not a justification for Kazanjian's discharge.

There is no evidence that the Respondent maintained any rule or policy that required a steward to receive permission to perform union activity while on the premises and off the clock. Kazanjian testified that he was not aware of any requirement that he request permission from Respondent before writing grievances off the clock. Bryan Grant has served as a steward since September 1998. He testified that when he was appointed to that position, his supervisor, Keri Alderman, and Schmaltz, both told him that he was to investigate grievances only before work, after work, or during break periods. Grant has followed those instructions and never requested permission of supervision to perform these functions while off the clock. He has also never been disciplined for performing steward functions while off the clock and without permission. Gary Watson testified that he also had performed grievance work while off the clock without having notified management and had never been disciplined.

Respondent additionally argues that Kazanjian was ordered to leave the facility on March 22 because he was in violation of a policy that prohibited employees from being in the building when off the clock. Respondent contends that it maintained a no-solicitation rule that provides, in part:

No employee shall enter or remain in the building and other work areas for any purpose except to report for, be present during, or conclude his or her shift. [R. Exh. 1.]

Kazanjian and fellow employees Watson, Bryan Grant, and Steve Buckles denied that they had ever seen this rule. The Respondent's witnesses testified that the rule was in effect at all material times. I credit the employees' testimony and find that this rule was not published to employees at the facility at the relevant times.

The Respondent also argues that there was another policy that was in effect at the time Kazanjian was discharged on March 22. This policy provides in pertinent part:

All employees must exit the building after they have clocked out. Employees working a double shift may remain in the breakroom until the next shift begins. [GC Exh. 8.]

General Counsel's Exhibit 8, the PCM in question, shows that it was reviewed with the twilight shift (Kazanjian's work area) on March 31, 1999—9 days after Kazanjian's discharge. Kazanjian, Buckles, Grant, and Watson testified that they were not aware of any rule or policy that required employees to leave the building after clocking out from their shift. Grant, Watson, and Kazanjian specifically denied that they had ever seen any of the PCM documents allegedly used by Respondent to disseminate its policy to employees. I find that the record does not support the conclusion that this PCM was broadly issued to

employees prior to Kazanjian's discharge. I also find that Kazanjian had not been advised of the PCM before he was terminated.

The Respondent presented testimony that Kazanjian knew of the policy because he was in attendance at a March 10 grievance meeting where the matter was discussed. Schmaltz and Falco testified that a grievance settlement was reached at this meeting that provided the Respondent would issue PCMs to employees notifying them of a requirement that they leave the building after clocking out. Kazanjian confirmed he was at this meeting but denied that there was any discussion regarding employees not being in the building when they were not on the clock. He also denied that there was any discussion or agreement regarding the issuance of PCMs concerning employees leaving the building after the end of their work shift.

Falco testified that the grievance was settled and withdrawn on that basis and that it "[d]idn't go any further past this particular day." Falco's notes from this meeting do not make any reference to any discussion of PCMs or any agreement to resolve the grievance through the issuance of PCMs. Likewise, the grievance which was allegedly settled and withdrawn on March 10 on the basis of such a PCM being issued does not mention anything about a resolution of the grievance or an agreement to issue PCMs. A later version of the same grievance document shows that discussion of this grievance was postponed by the parties and eventually resolved on June 11, 1999, by an agreement that Respondent would abide by articles 37 and 21 of the collective-bargaining agreement. (GC Exh. 9.) I find that the record does not support the conclusion that any PCM policy on the subject of requiring employees to leave the facility after completing work was agreed to or generally issued to employees prior to Kazanjian's discharge.

Supervisor William Whitney testified that employees who reported to work but were off the clock would use the breakroom. As noted, other stewards testified to performing union work off the clock without interference from the Respondent. Grant testified that he remained in the building on a daily basis off the clock after his shift to socialize with other employees and supervisors. He testified he engaged in these conversations in both work areas and the breakrooms and has never been disciplined for this activity. Kazanjian and Grant testified without contradiction that they were unaware of any employee except Kazanjian who had ever been disciplined for being in the building while off the clock. The Respondent offered no evidence showing any such discipline regarding any employee other than Kazanjian.

In sum, I find that the Government has shown by a preponderance of the evidence that Kazanjian, well known to the Respondent for his unrelenting union activity and the filing of unfair labor practice charges, was closely watched by management after he was reinstated in February 1999. The credited evidence shows that in March Kazanjian was singled out for discharge because he was in the facilities' breakroom filling out grievances after he was off the clock. The credit evidence does not establish that alleged policies prohibiting off the clock employees had been published to employees at the time of Kazanjian's discharge. Moreover, even assuming their existence and a direct order from Falco to leave the premises, I find that the

evidence shows that the Respondent has disparately enforced such rules against Kazanjian. The record supports the conclusion that Kazanjian was disparately selected for discharge because of his protected activities. I find that the Respondent has failed to prove that Kazanjian would have been discharged, regardless of his activities protected under the Act. I find that Kazanjian was discharged on March 22, 1999, in violation of Section 8(a)(1), (3), and (4) of the Act.

CONCLUSIONS OF LAW

1. United Parcel Service, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Teamsters Local Union 435 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1), (3), and (4) of the Act by discharging Andre Kazanjian on March 22, 1999.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, United Parcel Service, Inc., Commerce City, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging Andre Kazanjian, or any other employee, because they engage in union or other protected concerted activity, including filing charges under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Andre Kazanjian full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Andre Kazanjian whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the March 22, 1999 unlawful discharge of Andre Kazanjian, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1999).

(e) Within 14 days after service by the Region, post at its facility in Commerce City, Colorado, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 22, 1999. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against Andre Kazanjian, or any other employee because they engage

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in union or other protected concerted activity, including filing charges under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Andre Kazanjian full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Andre Kazanjian whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the March 22, 1999 unlawful discharge of Andre Kazanjian, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

UNITED PARCEL SERVICE, INC.